

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

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**LAWRENCE LAWLESS,**

*Petitioner,*

v.

**ROBERT PIERCE, MARY LOU MARZUKI, ARLENE KAGANOVE, EUGENE SCHWARTZ, FRED HENIZE, TIM WARREN, CHARLES NOTARUS, JOE MEREDITH, JON MENDELSON, THORN CREEK PRESERVATION ASSOCIATION, VILLAGE OF PARK FOREST, VILLAGE OF PARK FOREST SOUTH, FOREST PRESERVE DISTRICT OF WILL COUNTY, AND OTHERS WHOSE NAMES ARE PRESENTLY UNKNOWN TO THE PLAINTIFF,**

*Respondents.*

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## REPLY BRIEF

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## ARGUMENT

THE JUDGMENT OF THE COURT BELOW DOES NOT REST UPON ADEQUATE AND INDEPENDENT STATE GROUNDS

For this Court to refuse jurisdiction, based upon the doctrine, it must appear from the record that the state court grounds for decision are both independent and adequate. Klinger v. Missouri, (1872), 80 U.S. 257, 263, 20 L.Ed. 635,; Rogers v. Hennepin, (1916), 240 U.S. 184, 188-189, 60 L.Ed. 594, 365 S.Ct. 265. The judgment of the court below does not rest on adequate and independent state grounds and therefore this doctrine should not be applied.

This court has the power to examine the whole record so as to arrive at its independent judgment as to whether or not constitutional rights have been invaded and to insure that no constitutional freedoms, or guarantees of the Bill of

Rights will be defeated under the guise of state law. Napue v. Illinois, (1959), 360 U.S. 264, 271-272, 3 L.Ed.2d 1217, 79 S.Ct. 1173; 36 C.J.S. Federal Courts Section 280, Pages 768-769, 770-771.

Petitioner's adjudicated possessory rights during the two and one half year condemnation period are protected by the constitutional guarantees (Petition for Certiorari, Pages 22-30). He has been denied such protection by the lower court and, unless that decision is reversed, future landowners will be deprived of possessory rights, during condemnation, without "just compensation".

I. The Decision Of The Lower Court, Based Upon The Doctrine Of Election Of Remedies, Is Not An "Adequate" State Ground.

The facts in this case are undisputed. The court below affirmed the dismissal of petitioner's amended complaint

based upon the doctrine of election of remedies. As petitioner has shown in Part III of his Petition for Certiorari, (Pages 30-46) the doctrine of election of remedies was improperly applied to deprive petitioner of a constitutional right. The lower court relied upon dicta in Grunewald v. City of Chicago, (1939), 371 Ill. 528, 532, (Petition for Certiorari, Pages 30- 31) in applying the election of remedies doctrine. It does not apply to the facts in this case (Petition for Certiorari, Pages 31-32).

Grunewald does not represent Illinois law, nor the common law of the several states in this factual situation. It has never before been held that a party in adjudicated possession during condemnation proceedings may not defend against trespasses by others (Petition for Certiorari, Pages 16-21).

Even the court below, in its modified opinion, recognized that possession is the gist of a trespass action under Illinois law. Lawless v. Pierce, (1983), 118 Ill. App.3d 747, 753, 455 N.E.2d 113, (Petition for Certiorari, Appendix A).

The Illinois cases cited in Respondents Brief (Page 11) do not support Respondent's position. Rotogravure Service v. R. W. Borrowdale Co., (1979), 77 Ill.App.3d 518, 523-527, 395 N.E.2d 1143; Altom v. Hawes, (1978), 63 Ill.App.3d 659, 662-664, 380 N.E.2d 7 and Kaszab v. Metropolitan State Bank, (1932), 264 Ill. App. 358. The reasons for non-application of the doctrine of election of remedies are summarized in the Petition for Certiorari at Part III, Pages 44-45 and the applicable Illinois law at Pages 30-46.

The lower court should not have applied the doctrine on these facts and, as applied, the decision is contrary to law and not "adequate" within the meaning of the jurisdictional rule of this court.

If the rule were otherwise a state court could act with impunity and the Fifth Amendment protection, applied to the states through the Fourteenth Amendment, and the authority of this court, nullified.

## II. The Decision Of The Lower Court Has Important Fifth Amendment Implications Which Warrant This Court's Review.

It is respectfully submitted that the decision of the lower court intermingles and intertwines both the federal and state constitutional protections.

Lawless v. Pierce, (1983), 118 Ill.App.3d 747, 751, 455 N.E.2d 113, (Petition for Certiorari, Appendix A). This is understandable. With reference to the

requirement that private property not be taken for public use without payment of "just compensation", both Article I, Section 15 of the Illinois Constitution of 1970 and the Fifth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, are in pari materia.

Where the lower court applies the constitutional protection so as to protect the state and federal constitutional guarantees this court has held that the state ground for decision is independent and adequate. Jankovich v. Indiana Toll Road Comm., (1965), 379 U.S. 487, 13 L. Ed.2d 439, 85 S.Ct. 493. But where both the state and federal constitutions are, as here, so misinterpreted by the state court as to deprive petitioner of a constitutional right, an issue is presented

for review within this court's jurisdiction on certiorari. Delaware v. Prouse, (1979), 440 U.S. 648, 651-655, 59 L.Ed.2d 660, 99 S.Ct. 1391.

Review here is warranted for the reasons stated by this court in Walsh v. Wisconsin, (May 15, 1984), No. 82-5466, \_\_\_\_ U.S.\_\_\_\_, \_\_\_\_ L.Ed.2d\_\_\_\_, \_\_\_\_ S.Ct.\_\_\_\_, 52 L.W. 4581, 4583:

"\*\*\*Because of the important fourth amendment implications of the decision below, we granted certiorari. 459 U.S. \_\_\_\_ (1933)\*\*\*".

### III. Rule 17.1(b) Of This Court Applies. The Public Interest Warrants Review.

The atypical ruling of the courts below (the Illinois Supreme Court having denied appeal in both cases), decided on the same facts, bring this case within the purview of Rule 17.1(b). The Illinois Appellate Court, Third District, expressly denied petitioner's claim for "just

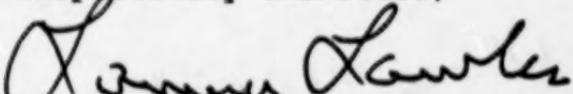
compensation" because it found petitioner to be in possession during the two and one half year condemnation period. The Illinois Appellate Court, First District, (the court below) recognized the prior finding of adjudicated possession which it described as sufficient to support a trespass action. It, however, found that petitioner was compensated for his possession in condemnation. Clearly when two state courts of last resort make opposite rulings on the same issue on the same facts, with the result that petitioner is denied any compensation for either taking of or damage to his adjudicated possessory rights, a constitutional violation has occurred (see Petition for Certiorari, Part IV, Pages 46-52).

More than petitioner's constitutional rights are here involved (Petition for Certiorari, Part V, Pages 52-58). If

the decision of the lower court is not reversed, future landowners, in condemnation, will be at the mercy of the public authority and the stage will be set for public dedication ceremony as a substitute for condemnation. If, thereafter, the public trespasses on private land pursuant to the public dedication, the landowner will be forced into successive trespass actions. If he does sue in trespass, the decision of the court below will preclude the filing of a mandamus action. If, because of the public dedication of his land, he seeks mandamus, the decision of the court below will preclude him from defending against trespasses during the condemnation period. That clearly is not the result intended by the "just compensation" clauses of the federal and state constitutions.

This court has consistently held that the right of exclusive possession is an important strand in the owner's bundle of property rights. Loretto v. Teleprompter Manhattan CATV Corp., (1982), 458 U.S. 419, 433, 73 L.Ed.2d 868, 102 S.Ct. 3164; Kaiser Aetna v. United States, (1979), 444 U.S. 164, 179-180, 62 L.Ed.2d 332, 100 S.Ct. 383. The decision of the court below destroys that important strand in a manner violative of the constitutional guarantees and for those reasons this court should grant certiorari.

Respectfully Submitted,



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